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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No._____

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

May It Please the Court:

The petition of the Butte, Anaconda & Pacific Railway Company, a corporation, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner is a shortline carrier whose road was in the possession and control of the United States and operated by the Director General of Railroads from January 1st, 1918, to September 27th, 1918, when it was relinquished, and thereafter, throughout the remainder of the period of Federal control, it was operated by the petitioner.

In a proceeding before the Interstate Commerce Commission, under the provisions of Sections 204 and 212 of the Transportation Act of 1920, entitled Reimbursement of Deficits During Federal Control (Appendix hereto, page 47),

petitioner filed its return with the Commission showing a net credit of $600,52[illegible]

Thereafter, the Commission determined the amount due petitioner to be $487,116.31, and that amount was offered to the petitioner on condition that it sign a release accepting said amount "in settlement of all claims against the government under said Section 204." (R. 44-46). See *Deficit Settlement with Butte, Anaconda & Pacific Railway,* 94 I.C.C. 617; decided March 20th, 1925, (R. 47-49). This amount was certified to the Treasurer of the United States and paid in full to petitioner on March 26th, 1925. The Commission made this award and settlement in accordance with its interpretation of Section 204 in *Construction of the Word "Deficit,"* 66 I.C.C. 765, decided February 9th, 1922. The Commission later reconsidered its said interpretation of Section 204 in the case of *Deficit Status of Bingham & Garfield Railway Co.,* 99 I.C.C. 724, decided October 17th, 1925, and thereafter attempted to reverse its decision and award and rescind its settlement with petitioner. (*Deficit Settlement with Butte, Anaconda & Pacific Railway,* 117 I.C.C. 780, decided March 7th, 1927.)

On August 23rd, 1929, the Government commenced this proceeding, by complaint as for money had and received, to recover said sum of $487,116.31, together with lawful interest from demand, and costs, (R. 2), alleging in substance the various proceedings had as above outlined. The gist of the action is that the construction placed by the Commission upon the word "deficit" (66 I.C.C. 765, supra) was an erroneous and unwarranted construction. (R. 5). Demurrer was filed to said complaint (R. 8), which was overruled by the District Court (R. 9), (38 Fed. (2d) 871), after which answer (R. 17), demurrer thereto (R. 34), overruled in part and sustained in part by the District Court (R. 37), and amended answer (containing affirmative defenses, first, compromise and settlement hereinbefore mentioned, second, cer-

tain equities in favor of the petitioner, and third, change in personnel of the Commission between the dates of its interpretations of Section 204 hereinbefore mentioned) (R. 40), were filed. Motion for judgment on the pleadings by the Government (R. 57) was granted by the District Court (R. 58), and judgment entered thereon (R. 60). Thereafter an appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit (R. 66), and, on appeal, the judgment of the District Court was affirmed (R. 95). (Opinion R. 82-94, 61 Fed. (2d) 587.)

The pleadings show that the petitioner, after having been relinquished by the Director General, sustained a deficit in railway operating income in its own operations during the Federal control period as compared with its test period operations, but that its railway operating income exceeded its railway operating expenses during the Federal control period. The pleadings raise the questions presented herein.

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit has herein decided an important question of Federal law which has not been, and should be, settled by this Court. The construction, interpretation and application of Sections 204 and 212 of the Transportation Act of 1920 are involved.

The Circuit Court of Appeals determined that the petitioner did not come within the terms of Section 204, subdivision (a), defining carriers, standing alone, or construed in connection with the other subdivisions of Section 204, because it did not, on the face of the pleadings, sustain a loss in its railway operating income during the Federal control period, although it suffered a decrease of $487,116.31 therein, as compared to the test period. There were seventy-two other shortline railroads similarly taken over by the Government

under the President's proclamation in accordance with the provisions of the Federal Control Act (Act of March 21, 1918; C. 25, 40 Stat. 451), and which were almost immediately released from Federal control, and continued to operate under the same conditions and with the same results as petitioner, which would be, and are, directly affected by any final determination of this proceeding.

A final decision by this Court will avoid a multiplicity of suits in the several circuits of the country because this case is admittedly a test case in that it is understood that the Government will not commence actions against other railroads similarly situated until this action shall be determined finally. The questions involved should be settled finally by this Court.

2. The decision of the Circuit Court of Appeals herein, holding that Section 204, Subdivision (a), covered only so-called "red ink" railroads, thus eliminating those shortline railroads which sustained a decrease in income and whose operations were less favorable during the period of Federal control than during the test period, but did not result in a "red ink" figure, is in conflict with the applicable decision of this Court in the case of *Continental Tie and Lumber Co. v. United States*, 286 U.S. 290, and the decision of the Court of Appeals of the District of Columbia in the case of *United States ex rel. Cripple Creek & Colorado Springs Railroad Co. v. Interstate Commerce Commission*, 11 Fed. (2d) 554, (*certiorari* denied, 273 U. S. 706).

3. The decision of the Circuit Court of Appeals herein, holding that the court has authority to review the determination of the Interstate Commerce Commission in its construction of Section 204, is in conflict with applicable decisions of this Court under the *Dent Act* (40 Stat. 1272) in the cases of *Work v. Rives*, 267 U.S. 175, *Wilbur, Secretary, v. United States ex rel. Vindicator Gold Mining Co.* 284 U.S. 231, and *Wilbur, Secretary, v. United States ex rel. Chestatee P. & C.*

Corporation, 53 Sup. Ct., 293, decided Jan. 16, 1933, and, in this connection, the decision of the Circuit Court of Appeals herein, holding that the deterimnation of the Interstate Commerce Commission was not final, despite the fact that it was the intention of Congress to make the certificate issued under Sections 204 and 212 final, is in conflict with applicable decisions of this Court in the cases of *Great Northern Ry Co. v. United States,* 277 U. S. 172, and *United States v. Great Northern Ry Co.,* decided November 7th, 1932, 53 S. Ct. 28.

4. The decision of the Circuit Court of Appeals herein, holding that the Interstate Commerce Commission did not have the power and authority both to construe the law and determine the facts under Sections 204 and 212, is in conflict with applicable decisions of this Court in the cases of *Great Northern Ry. Co. v. United States,* 277 U. S. 172, and *United States v. Great Northern Ry. Co.,* 53 Sup. Ct. 28, and the decision of the Court of Claims in the case of *Wyandotte Terminal R. R. Co. v. United States,* 64 Court of Claims 328, *(certiorari* denied, 276 U. S. 630), and the decisions of the Court of Appeals of the District of Columbia in the cases of *United States ex rel. C.C. etc. Ry. v. Interstate Commerce Commission,* 11 Fed. (2d) 554, *(certiorari* denied, 273 U.S. 706), and *United States ex rel. Abilene etc. Ry. Co. v. Interstate Commerce Commission,* 8 Fed. (2d) 901, *(certiorari* denied, 270 U.S. 650).

5. The decision of the Circuit Court of Appeals herein, determining that the reimbursement to shortline railroads under Section 204 was, in effect, a mere subsidy, and that when the petitioner received its reimbursement it had given the Government nothing in exchange therefor, and that the usual equitable principles applying in cases of suit for the recovery of money had and received should not apply, when the Government is the suitor, is in conflict with the decision of this Court in the case of *Continental Tie and Lumber Co. v. United States,* 286 U.S. 290, and the applicable decisions

of this Court in the cases of *McKnight v. United States*, 98 U.S. 179, and *United States v. Hill*, 120 U.S. 169.

6. The decision of the Circuit Court of Appeals herein, holding that there was no power in the Commission to compromise and settle the controversy herein between petitioner and the United States, despite the acceptance by petitioner of less than the amount claimed, in full settlement, discharge and release of petitioner's claim for reimbursement under Section 204, is in conflict with the applicable decision of the Court of Claims in the case of *Standard Steel Car Co. v. United States*, 60 Court of Claims, 726, and the applicable decision of the Circuit Court of Appeals, Third Circuit, in the case of *D'Olier Engineering Co. v. United States*, 244 Fed. 90.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6434, Butte, Anaconda & Pacific Railway Company, a corporation, Appellant, vs. United States of America, Appellee, and that the said judgment of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

BUTTE, ANACONDA & PACIFIC
RAILWAY COMPANY,
By D. M. KELLY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. _____

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Index precedes petition.)

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals for the Ninth Circuit, rendered on November 7th, 1932, is reported at 61 Federal (2d) page 587, and is printed in the record at pages 82 to 94, inclusive.

The opinion of the District Court for the District of Montana, overruling demurrer to complaint, rendered on February 26th, 1930, is reported at 38 Federal (2d) page 871, and is printed in the record at pages 10 to 17, inclusive.

The opinion of the District Court for the District of Montana, on demurrer to answer, rendered on May 31st, 1930, is printed in the record at pages 37 to 40, inclusive.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as

amended by the Act of February 13th, 1925, (C. 229, Sec. 1, 43 Stat., 938, 28 U.S.C.A., Section 347 (a).)

2. The date of the judgment to be reviewed is November 7th, 1932 (R. 95). Petition for rehearing was filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit on December 6th, 1932, and within thirty (30) days after the judgment was rendered, as provided by Rule 29 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, and the petition for rehearing was denied on January 16th, 1933 (R. 96).

III.

STATEMENT OF THE CASE.

The statement of the case under part "A" of the foregoing petition is hereby referred to and, in the interest of brevity, is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the order of the District Court overruling petitioner's demurrer to the complaint of the United States of America.

2. The Circuit Court of Appeals erred in affirming the order of the District Court sustaining the motion of the United States of America for judgment on the pleadings and ordering judgment in favor of the United States of America, and against the petitioner.

3. The Circuit Court of Appeals erred in finding and holding that there was no error in the judgment of the District Court entitling petitioner to a reversal, and in affirming said judgment.

V.

FEDERAL STATUTE INVOLVED.

An important question of Federal Law was decided by the Circuit Court of Appeals involving the construction of Sec-

tions 204 (Feb. 28, 1920, C. 91, Sec. 204, 41 Stat. 460, 49 U.S.C.A. Sec. 73.) and 212 (Feb. 28, 1921, C. 72, 41 Stat, 1145, 49 U.S.C.A. Sec. 79.) of the Transportation Act of 1920, set out in the appendix hereto on pages 47 to 50.

VI.

QUESTIONS INVOLVED.

A question of Federal law is involved which this Court should decide in view of the fact that the instant case is a test case. It is submitted that the decision of the Circuit Court of Appeals herein is inconsistent with the decisions of this Court, and other courts, as hereinafter discussed. There is also considerable confusion as to the construction and finality of Sections 204 and 212 which should be resolved by this Court.

That the construction given to Section 204 by the Circuit Court of Appeals herein is inconsistent with decisions of this and other courts which show that the construction of Section 204 by the Interstate Commerce Commission by virtue of which petitioner was reimbursed was, and is, correct, both as carrying out the intention of the Congress and as a liberal interpretation of the Transportation Act, declared to be remedial by this Court.

Contrary to the decision of the Circuit Court of Appeals herein, Sections 204 and 212, assuming, but not conceding, an erroneous construction thereof which included petitioner, vest the Interstate Commerce Commission with sole, exclusive and nonrecurrent power and discretion to determine the right of the petitioner (and other railroads similarly situated), to reimbursement thereunder, which required on the part of the Commission an interpretation of the law and a determination of the facts. The exercise of this jurisdiction was not an exertion of the power delegated to the Interstate Commerce Commission as such. These principles are in accord with applicable decisions of this and other courts.

Contrary to the decision of the Circuit Court of Appeals herein, the determination of the Interstate Commerce Commission under Sections 204 and 212 in including petitioner within the terms thereof, assuming, but not conceding, the same to be erroneous, was and is final and conclusive, binding alike upon the United States, the petitioner, the Commission and the courts, under decisions of this and other courts, so that the decision of the Commission cannot be reopened, reviewed, reversed or set aside by this or any other proceeding.

That the reimbursement paid to petitioner in accordance with Section 204 was not a payment for which the Government has received nothing in exchange, as stated by the Circuit Court of Appeals, but was a reimbursement for decrease in income sustained by it by reason of Government operation of railroads during the War period, being taxable income, as decided by this Court.

That the payment of the money under Section 204 was the result of a compromise and settlement, and therefore cannot be recoverd back by the Government, under the decisions of this and other courts, and the money so paid *ex aequo et bono* belongs to petitioner, as reimbursement and is not a subsidy for which the Government received nothing in return, as held by the Circuit Court of Appeals herein, contrary to applicable decisions of this and other courts.

VII.

ARGUMENT.

Since this case was decided on the pleadings, the specification of errors is necessarily general in raising questions which are stated as the reasons for the allowance of the writ, set forth in the foregoing petition, and, these questions will be argued in the order in which stated as reasons for the allowance of the writ.

1. THE CIRCUIT COURT OF APPEALS HEREIN

HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN AND SHOULD BE SETTLED BY THIS COURT.

Petitioner in the argument to follow has attempted to place before this Court the present situation shown by the decisions of this Court and the various other Federal Courts in determining the scope and effect of Sections 204 and 212 of the Transportation Act of 1920. It is respectfully submitted that the decisions show that the question has not yet been definitely decided by this Court.

There are numerous shortline railroads interested in a proper construction and interpretation of these sections, and in retaining the money paid them in accordance with the construction and interpretation of the Act by the Interstate Commerce Commission. The Commission, between February 9th, 1922, the date on which it decided *Construction of the word "deficit,"* 66 I.C.C. 765, supra, and October 17th, 1925, the date on which it decided *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I.C.C., 724, supra, awarded to seventy-two shortline carriers approximately $2,800,000.00, and issued certificates to the Treasurer thereon, which were paid. These carriers were all of the same class as petitioner in that they had sustained a decrease in railway operating income in the Federal control period as compared to the test period, but they did not sustain a loss in railway operating income during the Federal control period.

Since this case is a test case, brought by the Government to determine its right to recover back not only the payments made to petitioner but to all railroads similarly situated, a final decision by this Court would not only determine the rights of the petitioner but of many or all of the seventy-two railroads above menioned, and thereby avoid a multiplicity of suits. These many railroads are scattered throughout the country, and diversity of opinion will no doubt arise in the several circuits of the country on the questions involved,

and this Court would finally be called upon to decide the questions.

Unless petitioner is given the right of review at this time, its rights will be forever foreclosed, even though this Court should at a later date decide that petitioner's position is correct.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS, HOLDING THAT SECTION 204, SUBDIVISION (a), OF THE TRANSPORTATION ACT OF 1920, DOES NOT INCLUDE PETITIONER WITHIN ITS TERMS, IS IN CONFLICT WITH CONTINENTAL TIE AND LUMBER CO. vs. UNITED STATES, 286 U.S. 290, AND UNITED STATES EX REL. C. C. ETC. RY CO. v. INTERSTATE COMMERCE COMMISSION, 11 FED. (2d) 554, (*CERTIORARI* DENIED, 273 U.S. 706), IN CONSTRUING THE SAME PROVISION.

The position was taken by petitioner in the District Court, and again in the Circuit Court of Appeals, that petitioner was one of the railroads entitled to be reimbursed under Section 204.

In addition to the other requirements of subdivision (a) of Section 204, all of which are conceded, it "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation."

Petitioner's position was that this phrase, whether standing alone or construed in connection with the balance of Section 204, meant a decrease or falling-off in railway operating income, and not necessarily a "red ink" figure; first, by giving effect to the correct definition of the word "deficit" itself; second, to accord with the intent of the Congress as shown by the Congressional Record and by comparison with other statutes in *pari materia;* third, by reason of the known mischief to be remedied, which was actual

loss of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period; fourth, with proper regard for the history of this and similar acts relating to railroad legislation during the war period and subsequent thereto, and, fifth, because any other construction would result in discrimination and injustice.

But the Circuit Court of Appeals, sustaining the District Court, narrowed the construction of Subdivision (a) of Section 204 to exclude petitioner, intimating that such narrowed construction was admitted, (whereas petitioner had strenuously argued otherwise) in the following language:

> "It seems to be admitted that the terms of Subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the Control period." (R. 89.)

However, this court, in the case of *Continental Tie and Lumber Co.* vs. *United States*, 286 U.S. 290, 293, decided May 16th, 1932, had before it the question whether payments made under Section 204 were income, and held that:

> "* * * This section provided for such an award and payment to a railroad which during any part of the period of federal control competed for traffic, or connected, with one under federal control, and sustained a deficit in operating income for that portion of the period during which it operated its own railroad. *The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and, if less favorable during the period of federal control than during the test period, to award an amount calculated as prescribed by the section.* The Commission made an award and the Secretary of the Treasury paid the Railway." (Italics ours.)

This statement of the Supreme Court clearly shows that if the operation was less favorable during the period of federal control than during the test period, the railroad should be awarded the difference. The words "less favorable" do not import a loss but merely a decrease.

The same construction was placed on the words "deficit in railway operating income" in the case of *United States ex rel. Cripple Creek & Colorado Springs Railroad* v. *Interstate Commerce Commission*, 11 Fed. (2d) 554. (Certiorari denied, 273 U.S. 706). Therein the court said, at page 555:

> "Section 204 of the Transportation Act, entitled 'Reimbursement of Deficits during federal control' provided in general that a common carrier engaged in general transportation, which, during any part of the federal control period, competed for traffic or connected with a railroad under federal control, and which for the period that it operated under federal control sustained a deficit in operating income as compared with the operating income for a corresponding period of operation during the test period, the Interstate Commerce Commission should ascertain the difference in income so sustained, and the amount found should be certified by the Commission to the Secretary of the Treasury."

The Government may rely on the fact that in the *Continental Tie case*, supra, (286 U.S. 290), the railroad involved was a "red ink" railroad, as hereinabove denominated. Nevertheless the scope of the opinion of the Supreme Court is necessarily broad enough to include the petitioner within the terms of Subdivision (a) of Section 204, and is of sufficient import to show the necessity of a final determination of this particular question by this Court.

Moreover, the Circuit Court of Appeals herein, contrary to applicable decisions of this Court, construed the provi-

sions of Subdivision (a) of Section 204 in a narrow and restricted sense and so as to exclude therefrom and discriminate against those carriers which filled every other requirement therof, stating that:

> "The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed." (R. 91.)

It is not disputed that the Congress has the right to define the class of carrier entitled to the benefits of the Act, but it is the duty of a court, in construing an act of Congress, to carry out the intent of Congress, taking into consideration the circumstances under which the Act was passed and the known mischief to be remedied. Aside from the obvious purpose of subdivision (f) of Section 204 solely to take care of carriers which had no test period operation and to which the previous provisions of the Section could not apply, which is a common legislative provision, the Circuit Court of Appeals did not, by its decision, above quoted, give a liberal interpretation to Section 204, in conflict with the case of *Piedmont & N. R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 311, decided May 16, 1932, wherein this Court said:

> *"The Transportation Act was remedial legislation and should therefore be given a liberal interpretation."*

If the interpretation placed upon the purpose of the Congress in enacting Section 204 is restricted so as to cover only "red ink" carriers, it would be obviously unjust and discriminatory as to those carriers, such as petitioner, which suffered a decrease and falling off in railway operating income during the Federal control period as compared with the test period. The general rules of construction of reme-

dial statutes and their interpretation is exemplified by this Court in a decision construing an Act to quiet land titles in California wherein this Court said that:

> " * * * Those who could not show actual grants from the Mexican Government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation. * * * The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. * * * Otherwise, it seems to us clear that the purpose for which this seventh section was passed would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for."
>
> Beley v. Naphtaly, 169 U.S. 353, 359-361.

To the same effect:

> Johnson v. Southern Pacific, 196 U.S. 1, 18.

The Circuit Court of Appeals seems to have assumed that the narrower definition of "deficit" and "deficit in railway operating income" should be applied because the same word and the same phrase were used in a restricted sense elsewhere.

The fact that Congress used the same word, or the same phrase, in two different sections or subdivisions of the same Act is not at all conclusive that such word or phrase meant the same in each. This Court dealt with this question in its opinion in the case of *Atlantic Cleaners & Dyers* v. *United States*, decided May 23, 1932, 286 U.S. 427, 432, 433, wherein the Sherman Anti-Trust Act was under consideration. This Court said:

"The words describing the activity declared to be illegal are the same in both sections, namely, 'restraint of trade or commerce.' The contention on behalf of appellants is that the words, being identical, should receive the same construction in section 3 as in the preceding section 1; * * * It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance."

To the same effect:

Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U.S. 144, 166.

In Northern Pacific Ry. Co. v. *Interstate Commerce Commission,* 23 Fed. (2d) 221, 224 *(Certiorari* denied, 275 U.S. 572), the Court of Appeals of the District of Columbia dealt with Sections 209 and 212, Transportation Act, 1920, and in applying rules of construction, said:

"* * * As observed in Ozawa v. United States, 260 U.S. 178, 194, 43 S. Ct. 65, 67 (67 L. Ed. 199): 'It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning, in order that the purpose may not fail.' See, also Panama R. R. Co. v. Johnson, 264 U.S. 375, 390, 391, 44 S. Ct. 391, 68 L. Ed. 748."

Petitioner's position herein was that the Congress in the enactment of Section 204 treated the word "deficit" and the

phrase "deficit in its railway operating income" as used in Subdivision (a) thereof as meaning, and intended that they should mean, the difference between the test period income and the income during the period of Federal control, and to place a construction on subdivision (a) which would restrict the application of the Section to railroads only which suffered a loss during the Federal control period would lead to an unreasonable result, because to award reimbursement to a released railroad that sustained a loss of $1.00 in private operation during Federal control, but which had an income of $100,000.00 during the test period, while denying reimbursement to another released railroad that received an income of $1.00 in private operation during Federal control and which had an income of $100,000.00 during the test period, although both railroads sustained a decrease or falling-off in income, would be a restricted construction and lead to an unreasonable result, which would be in conflict with the decision of this Court in the case of *Piedmont & N. R. Co.* vs. *Interstate Commerce Commission,* supra, 286 U.S. 299, wherein this Court held that the Transportation Act was remedial legislation and should therefore be given a liberal interpretation.

This Court should take cognizance of this question and determine the same herein.

3. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT UNDER THE IDENTICAL SITUATION ARISING IN THE ADMINISTRATION OF THE DENT ACT (WAR MINERALS RELIEF ACT) BY THE SECRETARY OF THE INTERIOR, AND IS IN CONFLICT WITH GREAT NORTHERN RY. CO. VS. UNITED STATES, 277 U.S. 172, AND UNITED STATES VS. GREAT NORTHERN RY. CO., 53 S. Ct. 28.

The Circuit Court of Appeals herein stated (R. 91) that:

"The appellant contends that even though the Com-

mission misconstrued the Act in allowing to the railroad the sum of money which the government seeks to recover, that its act is not subject to review by the courts as the Commission had jurisdiction to determine the matter finally; that it acted judicially and that its first order must stand. This argument would be difficult to answer were the case one where the railroad had presented itself showing a deficit in its operating returns as compared with the test period and the dispute was as to the particular sum due to it. But, under the admitted facts, its case was not one which the Commission was authorized to consider at all."

The contention of the petitioner was, and is, that, after the conclusion of the war, the Congress, recognizing the losses suffered by and the damages done to the railroads, provided a method whereby the government might pay its just obligations. The Congress committed the task of determining its obligations to the Interstate Commerce Commission, not as such, but as a special tribunal to hear and determine and decide all cases coming within Section 204 as well as Section 209 of the Transportation Act.

In the case of *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172, 180, in considering the duties imposed upon the Interstate Commerce Commission by the Transportation Act, this court said:

"Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under title 4. The provisions here involved, which related solely to the termination of federal control, were grouped under title 2. Those which provided for the Railroad Labor Board under title 3. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not

an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so."

Sections 204 and 209 of the Transportation Act are found in title 2 thereof and, by the express declaration of this Court, are not amendments of the Interstate Commerce Act, and the remedies provided for the review of the legality or correctness of the Commission's action under these sections are not governed by the Interstate Commerce Act.

This court further said in the same case at page 180:

"The function imposed upon the Commission by Section 209 is solely that of determining the amount required to make good the government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War—a temporary, nonrecurrent task, which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official."

Great Northern Ry. Co. v. United States, 277 U.S. 172, 180.

Thus the functions of the Interstate Commerce Commission in performing this particular temporary, nonrecurrent task were such as might have been committed to the Secretary of the Interior or the Secretary of War, or any other official.

After the war the Government had many obligations to meet. Among other things it passed an act, known as the Dent Act, on March 2, 1919, (Chapter 94, 40 Stat. 1272, amended Nov. 23, 1921, C. 137, 42 Stat. 322), to provide relief in cases of contracts connected with the prosecution of the war, and also to provide for the payment of losses suffered by persons by reason of producing or preparing to produce manganese and other specified minerals in compliance with the request and demand of certain depart-

ments of the government. That act is sometimes referred to as the War Minerals Relief Act. Sections 1, 2, 3 and 4 thereof provide for relief to the contractors and protection for the subcontractors. By special provision the Secretary of War was required to report all settlements to the Congress, and Congress reserved to itself, or agencies appointed by it, the right to review any such settlements, and to the government the right to recover any money fraudulently paid. By section 2 of that act the Court of Claims is given jurisdiction to consider the claim of any person who is dissatisfied with the action of the Secretary of War.

By Section 5 of the same act the Congress committed the administration of the war minerals relief features thereof to the Secretary of the Interior, with power to adjust claims thereunder. Like Sections 204 and 209 of the Transportation Act, and unlike the previous sections of the same act, where a right of review of the Secretary of War's action is specifically reserved by the Congress, no provision was made for the review of the Secretary of the Interior's action in connection with war minerals relief under Section 5.

What happened in the construction of Section 5 of the Dent Act is a striking example of what this Court holds with reference to the finality of action in connection with these matters, both upon questions of law and fact, where no review is provided.

One Rives presented a claim under Section 5 to the Secretary of the Interior on account of moneys lost by reason of a contract of purchase of a manganese mine, which mine became worthless after the armistice, and upon which he had lost the sum of $9,000.00. The Secretary of the Interior denied this claim because, in his opinion, it did not come within Section 5 as a matter of law, in that Section 5 covered only moneys expended upon property in producing or preparing to produce manganese, and did not include the purchase price thereof. Rives commenced an action in the Supreme Court

of the District of Columbia seeking a writ of mandamus to compel the Secretary of the Interior to adjust his claim. This proceeding reached the Supreme Court of the United States. In denying the claimant Rives any relief, this Court said:

> "Congress intended the Secretary to act for it, and to construe the meaning of the words used to describe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the Decatur case."
>
> Work v. Rives, 267 U.S. 175, 182.

In this same case this Court held, speaking of Section 5, that:

> "Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the government under the first and second sections of the act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. * * * It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equiable and it made his decision conclusive and final. * * * ."
>
> Work v. Rives, 267 U.S. 175, 181, 182.
>
> To the same effect:
>
> Work v. Chestatee Co., 267 U.S. 185, 187.

Parenthetically, the same finality attaches to the certificate of the Interstate Commerce Commission as a special tribunal under the provisions of Section 212 (a) of the Transportation Act 1920, (Appendix p. 49). In the case of *United States* v. *Great Northern Ry. Co.*, 53 S. Ct. 28, 31, 32, this Court specifically held a certificate issued under Sections 209 (guaranty to carriers under Federal control at the time Federal control terminated) and 212(a) to be final and

conclusive under the terms of the Act itself, and also in conformity with the intent of Congress in enacting the same. No distinction of any kind can be made between Section 5 of the Dent Act, and the cases construing it, and Sections 204, 209, and 212 of the Transportation Act, and the cases construing these sections as herein set out.

After the decision in the case of *Work* v. *Rives*, 267 U.S. 175, above quoted, the Congress, by Act of February 13, 1929, 45 Stats. 1166, authorized the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior upon any question of law arising under Section 5 of the Dent Act.

Thereafter the Vindicator Consolidated Gold Mining Company, having been denied a claim based upon its investment in manganese mines, brought an action to review the decision of Secretary Wilbur, the then Secretary of the Interior, in denying a claim similar to that denied Rives in the *Work* case.

This Court affirmed the judgment of the Circuit Court of Appeals in granting the relief, holding that the Secretary of the Interior placed an erroneous construction upon Section 5 in failing to allow such claims, but that the above amendment permitted review on questions of law.

> Wilbur, Secretary, vs. United States ex rel. Vindicator Gold Mining Company, 284 U.S. 231, 234, decided December 7, 1931.

To the same effect:

> Wilbur, Secretary, vs. United States ex rel. Chestatee P. & C. Corporation, 53 Sup. Ct. 293, 294, decided January 16, 1933.

The *Work* case was decided March 2, 1925, and prior to the time when Congress had authorized a review of the Secretary's decisions on questions of law. The Congress has never authorized a review of the decisions of the Interstate Commerce Commission in the administration of the railroad relief

provided by Sections 204, 209 and 212 of the Transportation Act, and, by parity of reasoning, the rule must be the same as that enunciated in the *Work* case.

This is not a new rule. It was recognized by the Supreme Court of the United States as early as 1851 in the case of *United States* v. *Ferriera,* 13 Howard (U.S.) 39. In that case the Congress, for the purpose of adjusting claims under a treaty with Spain, provided that a judge of the United States District Court in Florida would investigate claims and submit his findings to the Secretary of the Treasury, who might approve or disallow the award. An attempt was made to appeal from the decision of the judge in the allowance of a claim. This court said, at page 47:

> "The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city. * * * *It cannot afterwards be disturbed by an appeal to to this or any other court, or in any other way, without the authority of an act of Congress."* (Italics ours.)
>
> United States v. Ferriera, 13 Howard (54 U.S.) 39, 47.

To the same effect:

United States vs. Arredondo, 6 Peters 691, 728.

The above cases are clearly applicable herein, and, in the language of this Court last quoted, where the Congress provides for the adjustment of claims against the government and commits them to any tribunal for decision "it cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress." When the Secretary of the Interior denied the

manganese claims purely on questions of law, and this Court, in *Work* v. *Rives*, 267 U.S. 175, supra, held his decisions final, the Congress of the United States passed a special act authorizing the review of such decisions on questions of law only. Thereafter, in *Wilbur* v. *Vindicator Gold Mining Co.*, 284 U.S. 231, supra, this Court, having then been given the authority to review the decisions of the Secretary on questions of law, found that the Secretary was in error in his interpretation of the law, though Rives had formerly been denied relief under similar circumstances because there was no Act of Congress authorizing a review.

The above cases are submitted herein to show a conflict between the principles enunciated in applicable decisions of this Court and the opinion of the Circuit Court of Appeals in the instant case, which should be resolved by this Court.

4. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN ON THE QUESTION OF THE FINALITY OF THE ACTION OF THE COMMISSION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN THE CASES OF GREAT NORTHERN RY. CO. vs. UNITED STATES, 277 U.S. 172 and UNITED STATES vs. GREAT NORTHERN RY. CO. 53 Sup. Ct. 28, AND THE DECISION OF THE COURT OF CLAIMS IN THE CASE OF WYANDOTTE TERMINAL RAILWAY vs. UNITED STATES, 64 COURT OF CLAIMS 328, (CERTIORARI DENIED, 276 U.S. 630), AND THE DECISIONS OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN THE CASES OF UNITED STATES EX REL. C. C. ETC. RY. vs. INTERSTATE COMMERCE COMMISSION, 11 FED. (2d) 554, (CERTIORARI DENIED, 273, U.S. 706), AND UNITED STATES EX REL. ABILENE, ETC. RY. CO. vs. INTERSTATE COMMERCE COMMISSION, 8 FED. (2d) 901, (CERTIORARI DENIED, 270 U.S. 650).

The Circuit Court of Appeals held herein:

"But, under the admitted facts, its case was not one

which the Commission was authorized to consider at all. It has been clearly settled that the Courts have full right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void." (R. 91.)

Undoubtedly Courts have the right to determine originally the purpose and effect of any statute, just as this Court determines the purpose and effect of the provisions of the Constitution of the United States, in any appropriate hearing, independent or otherwise. Such determination becomes the foundation upon which the rights of the parties litigant are to be declared. It is submitted that the Courts may have further functions, but this is not necessarily so. Two examples may be given.

If the purpose and effect of the statute, as so determined by the Court, be to vest an agency of the government with power to construe the statute and apply such construction to the facts, then the Courts can not be appealed to in the absence of specific statutory provisions for review. Such are the instant case and the case of *Work* vs. *Rives,* supra, 267 U.S. 175.

On the other hand, if the purpose of the statute be to vest an agency of the Government with the limited authority of applying the provisions of the statute to the facts in the case under consideration, the courts can again be appealed to, and, in the event that the agency of the Government erroneously construes or applies the statute, the Courts may proceed, by review, mandamus, appeal, statutory or otherwise, to correct the error. Such is the case of *Wisconsin Central Ry.* vs. *United States,* 164 U.S. 190, cited by the Circuit Court of Appeals herein. (R. 92.)

As this Court said in *Work* vs. *Rives*, supra, 267 U.S. 175, 177, 178:

> "Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do. * * * Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the *Kendall Case* and less than in the *Decatur Case*, and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose."

The position of petitioner throughout has been that the Interstate Commerce Commission was given by Section 204, and had, the power and discretion to determine what carriers were within the Act and entitled to reimbursement, as well as the amount of such reimbursement. The power was not lacking, the determination of the Commission was valid and final, as decided by the Courts in the cases herein, and the Courts cannot again be appealed to for determination of the correctness of the Commission's action under such power and in accordance with such discretion, there being no statutory provisions for review thereof.

In speaking of the Interstate Commerce Commission, this Court has said:

> "In some matters its duty is merely to investigate and to report facts. (Citing cases) *In others, to make determinations.* See *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172, 48 S. Ct. 466, 72 L. Ed. 838. In some, it acts in an advisory capacity. (Citing cases.) In others in a supervisory." (Italics ours.)

United States v. Atlanta B. & C. R. Co., 282 U.S. 522, 527.

Moreover, this Court in its decision in *Great Northern Ry. Co.* v. *United States*, supra, cited in the foregoing quotation, recognized the application of the principles enunciated in the case of *Work* v. *Rives*, supra, 267 U.S. 175, to Section 209 of the Transportation Act, in the following language:

> "We have no occasion to inquire whether a remedy at law or some other remedy in equity is available. The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the company to a judicial review. Compare United States v. Babcock, 250 U.S. 328, 331, 39 S. Ct. 464, 64 L. Ed. 1011; Work v. Rives, 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561."
>
> Great Northern Railway Co. v. United States, 277 U.S. 172, 182.

Thereafter, in the case of *United States v. Great Northern Railway Company*, supra, decided November 7th, 1932, 53 S. St. 28, 31, 32, which was a suit by the Government to recover moneys paid to the Great Northern Railway Company under Sections 209 and 212, this Court held that such certificates were final, and that such was the intention of the Congress, thereby resolving the uncertainty appearing in the quotation from *Great Northern Railway Company* v. *United States*, just quoted. Therefore the conclusive character of the determination in the *Work* case (*Work* v. *Rives*, supra, 267 U.S. 175), is clearly the doctrine that should apply in the instant case.

This Court furthermore has expressly recognized the above principle that if the agency of the Government acts within its authority and there is no mistake of fact, the Government is precluded from recovering payments made to carriers under Federal control at the termination of Federal control under Section 209 (Guaranty section), and Section 212, and has expressly distinguished the case of *Wisconsin Central*

Ry. Co. v. *United States,* 164 U.S. 190, and similar cases, (cited by the Circuit Court of Appeals herein, R. 92), in the case of *United States* v. *Great Northern Ry Co.,* supra, 53 S. Ct. 28, 31. In that case this Court said:

> "'In these circumstances we find no basis for a holding that the payment made to the respondent under the partial certificate of March 1, 1921, was due to any mistake of fact, either unilateral or mutual. United States v. Barlow, 132 U.S. 271, 280, 281, 10 S. Ct., 77, 33 L. Ed. 346. Cf. Gordon v. Butler, 105 U.S. 553, 557, 558, 26 L. Ed. 1166. The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. Wisconsin Central Railroad Co. v. United States, 164 U.S. 190, 17 S. Ct. 45, 41 L. Ed. 399; Grand Trunk Western Railway Co. v. United States, 252 U.S. 112, 40 S. Ct. 309, 64 L. Ed. 484; Burnet v. Porter, 283, U.S. 230, 51 S. Ct. 416, 75 L. Ed. 996. Charged with a difficult task exacting judgment and discretion, they came to a decision in good faith with knowledge of the relevant facts and without departure from the law. If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation."

Since, as has been heretofore shown, the Commission was given power under Sections 204 and 212 to construe the statute and determine the facts, to wit: To determine what carriers came within the provisions of Section 204, as well as the amount of reimbursement to be awarded to each (compare *Work* v. *Rives,* supra, 267 U.S. 175; *United States* v. *Ferriera,* supra, 13 Howard 39), then the Commission kept within the authority granted it and did not depart from the law, and did not act illegally. An erroneous construction of the statute as alleged in the complaint, if the construction be

erroneous, which is not conceded, made by the agency of the Government having authority to construe the statute, is not such an illegality as is contemplated by the above language of this Court. Since no mistake of fact was alleged herein and no illegality appears herein, because the legality of the construction depends on the authority to construe, there is nothing in the instant case to permit a review by the Courts, statutory, or otherwise, or to sustain reclamation.

Parenthetically, no fraud is alleged or appears herein as ground for relief.

Nor does it avail the Government herein that the Commission, after a change in personnel, and almost two years after issuance of its certificate and payment of reimbursement to petitioner under Section 204, attempted to reverse its decision and award and rescind its settlement with petitioner. The principles hereinbefore discussed, denying to the Courts the authority to review decisions of the Commission herein, are equally prohibitive of any subsequent action by the Commission itself. The finality attached to the certificate itself under Section 212 (a) and as intended by the Congress (compare *United States* v. *Great Northern Ry. Co.*, supra, decided November 7th, 1932, 53 Sup. Ct. 28, 31, 32) precludes such subsequent action. Nor does Title II of the Transportation Act, by amendment or otherwise, contain any statutory provision authorizing the Commission to grant rehearings and correct miscalculations (compare *Work* v. *Rives*, supra, 267 U.S. 175, 180, 182).

The Circuit Court of Appeals herein, immediately following its statement last hereinbefore quoted and here discussed, cited the following cases to sustain this statement:

Crowell v. Benson, 285 U.S. 22;

Interstate Commerce Commission v. Ill. Cent. R.R., 215 U.S. 452;

Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433;

Interstate Commerce Commission v. Union Pacific R.R., 222 U.S. 541;

Tagg Bros. & Moorehead v. United States, 280 U.S. 420, at page 442.

It is respectfully submitted that not one of these cases has any bearing on the question involved, and that the decisions of this Court hereinbefore discussed are controlling. As already shown under the holding of this Court in the case of *Great Northern Ry. Co.* v. *United States*, supra, 277 U.S. 172, 180, the Commission under Section 204 was not acting as the Interstate Commerce Commission but as a special tribunal.

The Circuit Court of Appeals fell into error by assuming that Section 204 of the Transportation Act was an amendment of the Interstate Commerce Act, in stating (R. 84), that:

> "The Transportation Act, approved February 28, 1920 (41 Stats. page 456), which amended the Interstate Commerce Act, provided (Sec. 204) that the Federal control of the railroads should terminate on March 1, 1920."

Section 204 of the Transportation Act is not an amendment of the Interstate Commerce Act, nor any part of the Interstate Commerce Act, and the procedure to be followed in determining the rights of claimants and of the Government under Section 204 is not governed by the Interstate Commerce Act. This Court has said so in the case of *Great Northern Ry. Co.* v. *United States*, supra, 277 U.S. 172, 180, as follows:

> "Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under title 4. The provisions here involved, which related solely to the termination of fed-

eral control, were grouped under title 2. Those which provided for the Railroad Labor Board under title 3. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality, or correctness of its action in doing so."

Notwithstanding these declarations by this Court, showing clearly that the Interstate Commerce Act had no relation to the functions of the Interstate Commerce Commission in the adjustment of these railroad claims, still the Circuit Court of Appeals cited the three Interstate Commerce Commission cases to sustain its right to review the action of the Commission. That Court also cited *Crowell* v. *Benson*, 285 U.S. 22, a case arising under the Longshoremen's and Harbor Workers' Compensation Act, (March 4, 1927, c. 509, 44 Stat. 1424). Section 21 of that Act provides for a review by the court, and that case itself expressly recognizes this fact. Again, the Circuit Court of Appeals cited in support of its conclusion *Tagg Bros. & Moorehead* v. *United States*, 280 U.S. 420, a case arising under the Packers' and Stockyards' Act (August 15, 1921, c. 64, Sec. 301 to 316, 42 Stat. 163). Section 316 of that Act specifically provides for a review of all orders in connection therewith, in the same manner as orders made by the Interstate Commerce Commission as such.

In treating Section 204 as an amendment to the Interstate Commerce Act, the Circuit Court of Appeals no doubt assumed that the orders of the Commission were reviewable under the Interstate Commerce Act as such.

The cases cited by the Circuit Court of Appeals, as heretofore pointed out, have no application to the question of a review of the award of reimbursement to petitioner because they are cases where a review was specially provided by the Act of Congress in each case, where none is provided in the

instant case.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals herein, in reviewing the decision of the Commission and in sustaining reclamation, is in conflict with the decisions of this Court hereinbefore discussed, and is not supported by the cases cited by that Court.

In addition to the finality attached to the determination of the Commission herein, as decided by this Court, the decision of the Circuit Court of Appeals herein is in conflict with the decisions of the Court of Claims and the Court of Appeals of the District of Columbia, directly in point as involving the finality of and lack of review of decisions rendered by the Interstate Commerce Commission under Section 204.

The Court of Claims said:

> "Congress under the provisions of the aforesaid act, and Section 204 thereof, created *a special remedy applicable to a certain class of cases well defined in the act, and conferred upon a special tribunal the power to act in such cases, a tribunal especially equipped to deal with such cases. The statute creates a right and provides a special remedy, and that remedy, we think, is exclusive. In this case the special tribunal finds that there is nothing due to the plaintiff under the provisions of the act, and no remedy is provided by which the plaintiff can question this decision. The purpose of Congress was to settle this class of claims, and to settle them in the manner prescribed by the terms of the act, otherwise in every case the party who might feel aggrieved by the action of the commission might bring suit in this court for the purpose of upsetting every award of the Commission, whether the party was awarded something or nothing. If this can be done, the purpose of Congress to bring about a settlement of*

this class of claims in a manner which it specially prescribes will be defeated.

"We do not think that the decision of the Commission in this case is subject to review by this court. United States v. Babcock, 250 U.S. 328, and cases there cited." (Italics ours.)

Wyandotte Terminal R. R. Co. v. United States, 64 Court of Claims, 328; (*Certiorari* denied, 276 U.S. 630).

The Court of Appeals of the District of Columbia said:

"The statute here under consideration provides for the payment of a deficit to railroads not under Federal operation; the deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. *This duty imposed upon the Commission is judicial in character, calling for a determination, not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto.* This, we think calls for more than a mere ministerial act, to be performed by the Commission under express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of Mandamus." (Italics ours.)

United States ex rel. Abilene, Etc., Ry. Co. v. Interstate Commerce Commission, 8 Fed. (2d) 901, 902; (*Certriorari* denied, 270 U.S. 650).

The Court of Appeals of the District of Columbia also said:

"We have reviewed this case at considerable length, in order that the numerous errors committed by the commission, growing out of its refusal to treat the combined lines as a 'system of transportation,' may become apparent. These errors, however, we are unable to correct in this proceeding. This is not a case where the commission has, for any reason, refused to assume

jurisdiction of the case, as in Kansas City Southern Railway Co. v. Interstate Commerce Commission, 40 S. Ct. 187, 252 U.S. 178, 64 L. Ed. 517; but it falls within our holding in U.S. ex rel. Abilene & Southern Railway Co. v. Interstate Commerce Commission, 8 F. (2d) 901, 56 App. D.C. ——. *The Commission has construed the statute and applied its construction to the facts, and, however erroneous, its conclusions, under recent decisions of the Supreme Court, are beyond our jurisdiction to correct in this proceeding.*" (Italics ours.)

United States ex rel. C. C. etc. Ry. v. Interstate Commerce Commission, 11 Fed. (2d) 554, 556; *(Certiorari* denied, 273 U.S. 706).

To the same effect:

United States ex rel. Empire & S. E. Ry Co. v. Interstate Commerce Commission, 45 Fed. (2d) 293, 294; *(Certiorari* denied, 283 U.S. 834).

True, these cases were cases where the Commission had denied relief to the claimant and the claimant was attempting to obtain relief in the courts. These courts, following the rules announced by this Court in other cases, held that the action of the Commission, no review having been authorized by Congress, was final and conclusive.

This Court should determine whether the citizen is to be bound by the decisions of the Commission in this class of cases because the Congress provided no right of review, while the Government of the United States is to be given that right.

5. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN ON THE QUESTION OF REIMBURSEMENT TO PETITIONER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THE CASES OF CONTINENTAL TIE AND LUMBER CO. v. UNITED STATES, 286 U.S. 290, McKNIGHT v. UNITED STATES, 98 U.S. 179, AND UNITED STATES v. HILL, 120 U.S. 169.

The Circuit Court of Appeals herein held (R. 92):

"The United States may demand repayment of money

paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the right, and are bound, upon demand, to return it. Decisions determining the question differently where private parties are wholly concerned, are not pertinent. No estoppel as for voluntary payment can be claimed to defeat the suit of the Government."

The Circuit Court of Appeals thus decided that the question herein might have been determined differently were private parties wholly concerned. This is contrary to the applicable decisions of this Court, holding that the rules of law which apply to the Government and to individuals are the same. This Court, in *McKnight* v. *United States*, 98 U.S. 179, 185, said:

"It is true the assignment was contrary to law, and therefore, a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment, or improper purpose on either side. * * * Under the circumstances, it is quite clear that if the controversy were between private parties, there could be no recovery. I Story, Contracts, Sect. 541. With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter."

Again, in *United States* v. *Hill*, 120 U.S. 169, 182, action was brought by the Government to recover damages for defendant's failure as a clerk of court to account for certain fees he had received. In denying recovery, this Court said:

"With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires

a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, *a court seeking to administer justice* would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, *reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.*" (Italics ours.)

In view of the above decisions of this Court, it is submitted that the decision of the Circuit Court of Appeals was based upon an erroneous assumption that the question should be decided differently, where the government is involved. This should move this Court to hear the case and decide the question itself on the principles enunciated in the cases of *McKnight* v. *United* States, 98 U.S. 179, supra, and *United States* v. *Hill*, 120 U.S. 169, supra.

Continuing, the Circuit Court of Appeals herein said (R. 93):

"No conditions are present like those where a person has contracted with a government agency and received payment in return for a consideration actually rendered by him (as the performance of work) and it has later

been discovered that the contract was not legally authorized. Here the railroad company returned nothing to the government in exchange for the money received. * * * ."

This Court in two recent cases decided on May 16, 1932, *Texas & Pac. Ry Co.* v. *United States,* 286 U.S. 285, 289, considering Section 209, and *Continental Tie & Lumber Co.* v. *United States,* 286 U.S. 290, 293, supra, considering Section 204, has specifically held otherwise.

In the latter case this Court said:

"What we have said in Texas & Pacific Railway Co. v. United States, decided this day, 286 U.S. 285, is determinative of the first contention. Section 209 of the Transportation Act (49 U.S.C.A., Sec. 77) guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of federal control to railroads which had been taken over by the United States. By the terms of Section 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within section 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by government operation of the larger railroad systems. The transportation act did not contemplate that the payments to be made pursuant to section 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress

for which was the purpose of the section where actual deficits in income had resulted. For the reasons set forth in Texas & Pacific Ry. Co. v. United States, supra, we hold that these payments were not subsidies or bonuses, but were income within the intent of the amendment and the statute."

Continental Tie & Lumber Co. v. United States, 286 U.S. 290, 293.

These cases arose under the Federal Income Tax Law, and considered the question as to whether the payments made under these sections to the railroads were subsidies or taxable income, and in both cases it was held that such payments were taxable income. If the railroads had surrendered nothing in exchange for such payments, they could not have been considered income, and therefore, the question was directly involved, and the conflict should be resolved by this Court.

6. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN ON THE QUESTION OF SETTLEMENT IS IN CONFLICT WITH THE DECISIONS OF THE COURT OF CLAIMS IN THE CASE OF STANDARD STEEL CAR CO. v. UNITED STATES, 60 COURT OF CLAIMS, 726, AND OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT IN THE CASE OF D'OLIER ENGINEERING CO. v. UNITED STATES, 244 Fed. 90.

The Circuit Court of Appeals herein held (R. 92):

"The added contention of appellant that the settlement made was one of compromise does not make a different case because the railroad company was not entitled to any amount under the facts as admitted."

In the case of *Standard Steel Car Co.* v. *United States*, 60 Court of Claims 726, which arose under the Dent Act, the Court of Claims said:

"It is contended that the action set up in the counterclaim is not one to set aside the award made by the

Secretary of War, and while it is entirely true that the relief sought is not so in terms pleaded it is sought to recover the amount, or very nearly the entire amount, two items being excepted, *awarded to the plaintiff by the Secretary of War, paid pursuant to that award, and accepted by the plaintiff in satisfaction of its claim*, and even though it be not prayed that the award be set aside, that must undoubtedly be the effect of the rendition of a judgment for the recovery of the amount awarded and paid. *A determination of the merits of the counterclaim on the facts must necessarily involve a 'review' (a word found in the statute)* of the award, and if a judgment for the recovery of the money awarded and paid could be rendered without having the effect of setting aside the award, even though not so decreed in terms, the plaintiff would remain the beneficiary of an award duly accepted and paid but converted into an anamalous sort of *a nudum pactum* by the requirements that it surrender the fruits. *We cannot escape the effect of an action by contention as to the name with which we will christen it.*" (Italics ours.)

The effect of permitting the Government to recover in the instant case would be to set aside the compromise, settlement, and award of the Commission.

This Court has held in the case of *United States* v. *Justice*, 81 U.S. 535, 549, that:

"It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen, but from such submission neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to

take it, with a proper protest. This protest is necessary to inform the government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint *on either side*, and the status of the parties is not affected by anything which transpired before the Commission." (Italics ours.)

Had this controversy arisen between individuals there would not have been the slightest basis for the maintenance of this action. Petitioner presented its claim to the Interstate Commerce Commission in excess of $600,000. In response to this it was offered a sum less than $500,000 conditioned that it be accepted in full settlement, discharge and release. This offer was accepted and a written acceptance and release executed (R. 44-46). No more direct, positive example of compromise and settlement could possibly be imagined and, under the law as between private individuals, no doubt could arise as to the right of the appellant to retain the money so received.

As previously shown, the rule is well recognized and has been frequently stated by this Court that, with few exceptions, rules of law apply to the government and individuals alike; there is not one law for the former and another for the latter.

The Circuit Court of Appeals herein further said (R. 93):

"Plaintiff had only to show that the money was improperly paid as described. What use appellant thereafter made of it is immaterial. No estoppel can be claimed because it disbursed the fund and was taxed because of the possession and claimed ownership of it. The decisions cited affirming the right of the United States to recover public money so paid out without authority of law, as a corollary must imply that there is

no estoppel under conditions such as this case presents."

In the case of *D'Olier Engineering Co.* v. *United States*, 244 Fed. 90, the Circuit Court of Appeals for the Third Circuit had under consideration a settlement made by the government with the plaintiff in connection with the furnishing of boilers in the plants of the Panama Canal. It appears that the government was to pay a stipulated price for the boilers, based among other things on a rating of 72 per cent. efficiency. After the installation of the boilers a test was to be made by a government engineer and a representative of the plaintiff and settlement made thereon. An admitted mistake was made by the engineers, and the boilers were overrated to the extent that the plaintiff was overpaid some thousands of dollars more than it would have been had the rating been made in accordance with the contract. An action was brought by the government to recover the amount so paid. The lower court, while recognizing the principle of compromise, found that the money was not paid "in compromise of a claim in dispute" and authorized a recovery on the part of the government. On appeal the Circuit Court of Appeals vacated the judgment and said:

> "It will thus be noted that this action at law while in form for the recovery of money mistakenly paid under the contract of November 17, 1908, is in reality the annulling of the settlement of February 28, 1910, so made by the parties, of all matters in dispute under said contract. This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement contract that has already been performed, and that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit the government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a

bill to rescind the agreement of settlement."

D'Olier Engineering Co. v. United States, 244 Fed. 90, 94.

In *Walker* v. *United States,* 139 Fed. 409 (Aff'd 148 Fed. 1022), it was held that where a marshal has in good faith rendered accounts against the United States, covering service of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which had previously been recognized as governing such allowances and with knowledge that the greater part of the money would be paid over to the deputies rendering the services, the governmnt is not entitled to recover the sum so paid the marshal, after years have elapsed and he has gone out of office, even though the allowance may have been made under an erroneous construction of the law. The court said at page 413:

> "The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man."

In view of the recent decision of this Court in the case of *Continental Tie & Lumber Company* v. *United States,* supra, 286 U.S. 290, that the award under Section 204 is income, constituting reimbursement to shortline railroads for losses sustained by reason of government control of railroads, the loss being recognized and the moral obligation being fulfilled, in equity and good conscience petitioner should retain the reimbursement awarded and the government should not be permitted to recover back the money paid.

The loss to petitioner, for which it was reimbursed, is just as much a loss, though a decrease in railway operating

income during the Federal control period as compared to the test period, as if solely a loss during the Federal control period. This last point is raised herein, on the ground that the decision of the Circuit Court of Appeals is at variance with the cases next hereinbefore cited, as well as on the ground that it is desired by this Court that all questions involved shall be set out in the petition for a writ of certiorari.

CONCLUSION.

It is respectfully submitted that:

1. The question of Federal law involved in this case is a most important one and should be settled by this Court. This petitioner, and other short line railroads similarly situated, which suffered a decrease in railway operating income during the Federal control period as compared with the test period operations, should be entitled to a solution of the conflict existing between the decision of the Circuit Court of Appeals herein and the various decisions of this Court and of the Circuit Courts of Appeals, the Court of Appeals of the District of Columbia and the Court of Claims, herein discussed, on the various questions involved.

2. The decision of the Circuit Court of Appeals, in construing Subdivision (a) of Section 204 of the Transportation Act, is shown to be in conflict with the decisions of this Court and other courts which have considered the matter as to the proper meaning of this subdivision.

3. Regardless of the proper interpretation to be given to Subdivision (a) of Section 204, the decision of the special tribunal to whom Congress committed the administration of this Act, is shown by decisions of this Court and several other courts, to be final and conclusive, and not subject to review as held by the Circuit Court of Appeals.

4. The Circuit Court of Appeals, in deciding that, without regard to the fact that this money was paid as the result of a compromise and settlement, the government can still

recover, is in conflict with the decisions of this Court and many courts of the country, as herein shown.

5. The decision of the Circuit Court of Appeals, to the effect that the government can disregard this settlement and sue for money had and received, which the petitioner in equity and good conscience should be permitted to retain, without setting aside the settlement or without restoring the petitioner to its status quo, is contrary to the decisions of this Court and the courts of the country generally.

It is, therefore, respectfully urged that this Court grant the Writ of Certiorari petitioned for herein.

Respectfully submitted,

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APPENDIX.

Excerpts from the Transportation Act of 1920:

"Reimbursement of Deficits During Federal Control.

"Section 204. (a) When used in this section—

"The term 'carrier' means a carrier by railroad which, during any part of the period of Federal Control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

"The term 'test period' means the three years ending June 30, 1917.

"(b) For the purpose of this section—

"Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

"Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

"(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if

any (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called 'test period return'): *Provided,* That 'test period return,' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

"(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

"(e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

"(f) If the sum of the amounts so credited to the

carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

"(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated." (Feb. 28, 1920, C. 91, Sec. 204, 41 Stat. 460, 49 U.S.C.A., Sec. 73.)

Amendment to the Transportation Act of 1920 (enacted February 26, 1921):

"Sec. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn

pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) If for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement." (Feb. 26, 1921, c. 72, 41 Stat. 1145, 49 U.S.C.A. Sec. 79.)